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IN THE

Supreme Court of the United States

October Term, 1959. No. 767

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.,

Petitioners,

vs.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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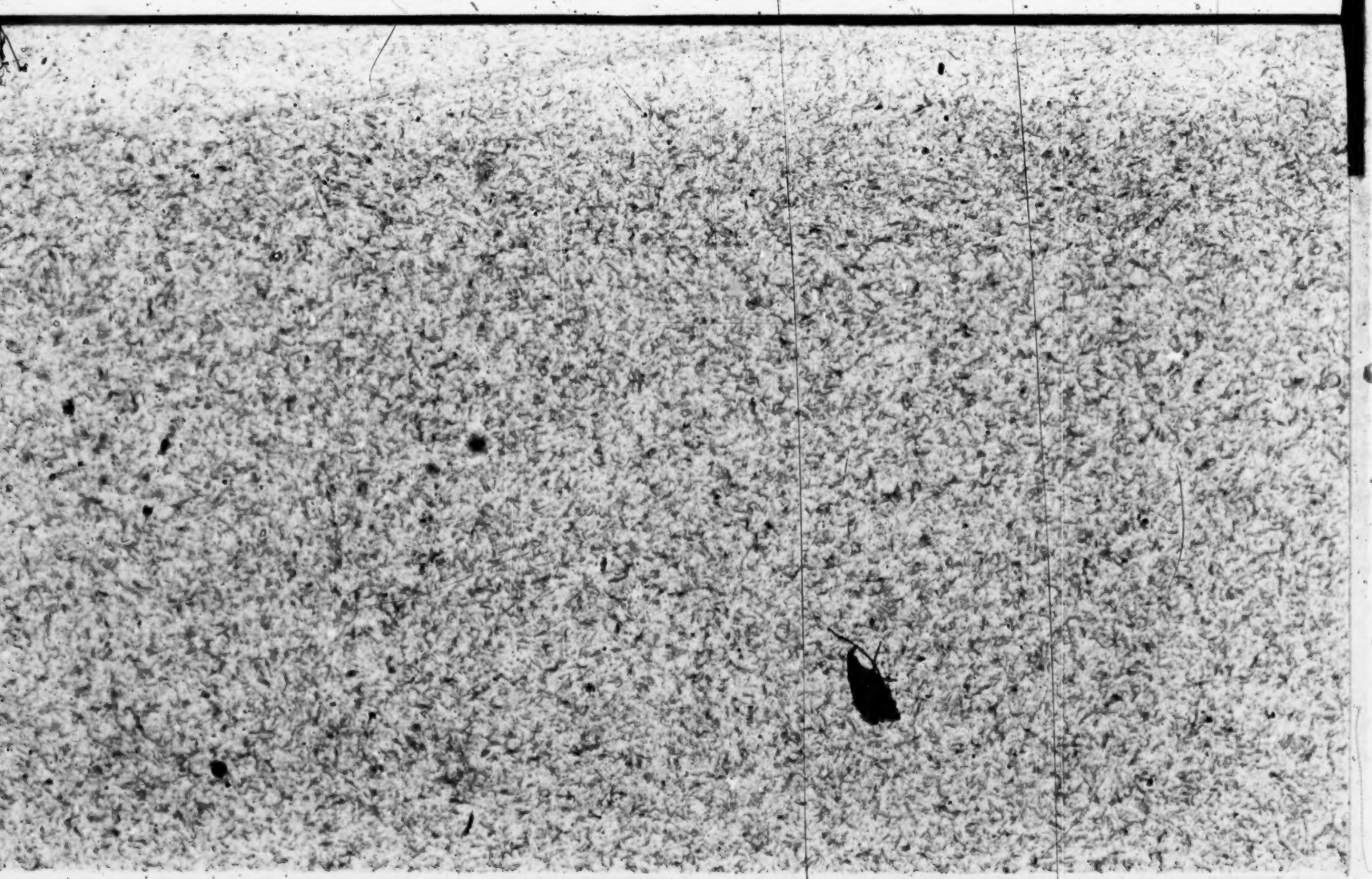

INDEX

PETITION: PAGE

Basis of Jurisdiction 1

Questions Presented 2

Summary Statement of Matter Involved 3

Reasons Relied Upon for Allowance of Writ and Argument in Support Thereof 6

Conclusion 9

APPENDIX:

Petition for Writ of Mandamus 12

Memorandum Opinion and Order 18

Notice to Take Deposition Upon Oral Examination ... 23

Order of Court of Appeals 26

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1959. No.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN Co.,
Petitioners,

vs.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners JOHN TAXIN and BERNARD TAXIN, trading as JOHN TAXIN CO. pray that a Writ of Certiorari issue to review the judgment of The United States Court of Appeals for the Third Circuit, denying their Petition for a Writ of Mandamus directed to the Judges of the Eastern District of Pennsylvania.

BASIS OF JURISDICTION.

The order of the Court of Appeals for the Third Circuit (Judges McLaughlin and Staley) was entered on January 11, 1960 (A. 26). The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 928 (28 U. S. C. A. 1254).

QUESTIONS PRESENTED.

1. Where the District Court files a written opinion and order under which petitioners are afforded certain rights, may it thereafter deny such rights to petitioners after the time for appeal has passed?

2. Did not the Court of Appeals err in dismissing petitioners' Petition for a Writ of Mandamus on the theory that it was a mere substitute for an appeal, the time for which had expired?

SUMMARY STATEMENT OF MATTER INVOLVED.

On September 11, 1959, petitioners instituted an action in The United States District Court for the Eastern District of Pennsylvania charging, inter alia, that defendants had conspired in violation of the antitrust laws to restrain trade and commerce in fruit and produce distributed in the Philadelphia area. Petitioners prayed for an injunction and for money damages in the amount of $1,200,000. The complaint charged, in essence, that defendants conspired unlawfully to obtain a discriminatory buying preference over competitors by controlling the terms and conditions upon which suppliers sell to them and to their competitors by (a) coercing suppliers to sell to other wholesalers and retailers on terms and conditions dictated by them; (b) coercing suppliers to discontinue selling to petitioners and other competitors; (c) demanding and obtaining options to purchase and handle substantially entire crops of growing fresh fruits and produce, thereby depriving their competitors of access to such products; and (d) by securing possession of large shipments of produce from growers, shippers and suppliers, for purchase for their own accounts or for sale to others, at their election, at prices to be determined after arrival in markets selected by them and to account to said growers, shippers and suppliers on the basis of market prices controlled and established by them.

Defendants filed answers averring, inter alia, that the claim was barred by reason of a release which petitioners had executed and delivered to them on March 28, 1958, the consideration for which was the payment of $18,000 to petitioners' counsel.

Petitioners filed replies under oath to these answers averring, inter alia, that the release was no bar to the action for the following reasons:

1. Petitioners were induced to sign the alleged release by reason of certain fraudulent representations made by certain of the defendants, to wit, that in exchange therefor, Food Fair Stores, Inc. would agree to purchase a minimum of $500,000.00 per year worth of fruit and produce from petitioners.

2. Defendants would not enter into a written agreement setting forth these terms, but petitioners would have to rely on defendants' good faith to perform.

3. Defendants never intended to carry out their promise, but petitioners relied thereon and would not have executed the document had it not been for defendants' fraudulent representations.

4. Petitioners received no consideration for the release and would not have executed same except for the said fraudulent representations.

5. The release was obtained by defendants as part of and in furtherance of the basic conspiracy charged in the complaint.

On December 14, 1959, the District Court, over the objection of plaintiffs, ordered a separate trial of the release issue under Rule 42(b), filing a written opinion and order (A. 18).

In the said opinion and order the following language appears:

> "Clearly the evidence necessary to determine the issue of fraud is different from the evidence necessary to determine the issues in the main case. *With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy' plaintiffs will not be limited in their presentation of evidence to support this argument.* However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then

> we think its validity will have been established. We do not understand how proof of the allegation that the release is 'part and parcel of the conspiracy' could detract from its validity. Nevertheless, as we pointed out above, *plaintiffs will be free* to develop this argument at the separate trial . . . (Emphasis supplied.)
>
> * * * * * * * * *
>
> NOW, THEREFORE, . . . IT IS ORDERED that a jury be empaneled to serve on February 15, 1960. On that date, a separate trial will be held in which the parties may present evidence and arguments on the following questions: . . . (2) whether the release is void because it was obtained as 'part and parcel of the conspiracy'; . . ."

Upon receipt of this opinion and order, petitioners noticed the taking of defendants' depositions with a request for the production of documents relating to the conspiracy issue. Copies of said notices were served on the trial judge and opposing counsel on December 16, 1959 (A. 23).

Petitioners commenced the taking of defendants' depositions on December 28, 1959 when for the first time defense counsel objected to any questions directed to the conspiracy phase of the case. The trial court held an immediate conference and sustained defendants' position on the theory that the separate trial was limited solely to the release question and that evidence of conspiracy could not be inquired into.

Petitioners thereupon filed a Petition for a Writ of Mandamus in the Court of Appeals for the Third Circuit seeking to compel the trial judge to interpret his opinion and order so as to permit petitioners full and complete discovery, particularly on the issue of conspiracy as it affects the release question.

The Court of Appeals (Judges McLaughlin and Staley) denied the petition on the ground that the time for appeal had passed and mandamus could not be substituted therefor.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT IN SUPPORT THEREOF.

1. No Court of the United States should permit a party to any proceeding to be deprived of his full day in court by misleading him in a written opinion and order.

2. There is no case in which a party to an antitrust action was given certain rights in a trial court's order which, after the time for appeal had passed, were then denied him.

3. This Court should decide whether mandamus will not lie to compel a trial judge reasonably to interpret his own written language in an opinion and order upon which petitioners relied.

4. This Court should decide whether mandamus is appropriate in a case in which petitioners have been misled by the express written language of the trial court, particularly where no other remedy is available to them.

The novel question presented is whether petitioners were justifiably misled by the language contained in the opinion and order of the District Court quoted above at pages 4 and 5. If they were so misled, should not this Court give them the relief prayed for?

Prior to the filing of the opinion and order in question, petitioners had argued vigorously against the award of a separate trial of the release issue on the grounds (1) that a separate trial was unnecessary in that all matters could best be resolved in a single trial: *Radio Corporation v. Raytheon*, 296 U. S. 459, 80 L. ed. 327 (1935); *Frasier v. Twentieth-Century Fox*, 119 F. Supp. 495 (D. C. Nev. 1954); Moore's Federal Practice, Volume 5, page 1211, and (2) that if a separate trial were ordered, unless petitioners

could present evidence of the basic conspiracy, and show thereby that the release was part and parcel of that conspiracy, their case would be emasculated.

Petitioners' position was, and is, that no case can be tried *in vacuo* and therefore to permit a jury to determine whether a release was part and parcel of the basic conspiracy charged, it would be essential to present evidence of *that* conspiracy to the jury. Since defendants' fraud has been charged on the record, evidence of the entire conspiracy is most relevant to a determination of the fraud issue.

The trial judge, however, on December 14, 1959 filed an opinion and order awarding a separate trial to a jury, in the course of which he stated (A. 20):

> "With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy', *plaintiffs will not be limited in their presentation of evidence to support this argument . . . plaintiffs will be free to develop this argument at the separate trial.*"

Petitioners argue that this language is capable only of the interpretation which they have placed upon it; to them it required no clarification.*

The trial judge apparently similarly construed this same language since, in his order, the following appears (A. 22):

> ". . . the parties may present evidence and arguments on the following questions: . . . (2) whether the release is void because it was obtained as 'part and parcel of the conspiracy' . . ."

We are at a loss to comprehend how petitioners could possibly introduce evidence that the release was part of a

---

* The trial judge and the defendants were aware of petitioners' construction of the opinion and order by reason of the deposition notices served on them on December 16, 1959. (A. 23.)

conspiracy about which they have been silenced. Mathematically we envision the following formula:

$$\text{Release} + x = \text{Fraud}$$

with no possibility of proving "x". If "x" is in fact to remain an unknown, then an integral part of petitioners' case has been withdrawn from them.

Petitioners' case depends upon their ability to prove the various steps in the conspiracy among Food Fair Stores, Inc., its individual officers, the defendant Mandell who significantly became a vice-president of Food Fair after the execution of the so-called release, and the other defendant companies owned or controlled by Mandell. Such proof goes to the heart of petitioners' entire case and specifically to the heart of the issue whether the release was obtained by fraud.

We can find no case in which a litigant has been deprived of his day in court, as will result here unless this Court grants the petition for certiorari.*

The Court of Appeals, however, treated the petition for mandamus as a mere substitute for an appeal, the time for which had passed. No consideration whatsoever was given to petitioners' argument that the trial judge's language, as later distorted or ignored by him, was so misleading as to place petitioners in a position requiring the extraordinary relief which mandamus alone could give them.

We urge this Court to grant to petitioners relief from the position in which the court below has now placed them.

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* On February 3, 1960, defendant Mandell argued a motion for summary judgment based, in part, on the fact that he had not attended any of the negotiations leading up to the release. Petitioners argued that if he were in fact a conspirator, his participation was unimportant. The trial judge then inquired what evidence there was on the record to show that he had conspired. Petitioners pointed out that the limitation imposed upon them in the taking of depositions precluded the presentation of any such evidence. (Pages 32-34, Hearing of February 3, 1960 attached hereto as Exhibit A.) Thereafter, on February 18, 1960 the lower court granted the motion for summary judgment.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and that this Court should thereafter review and reverse the adverse decision of the court below.

LESTER J. SCHAFFER,
Attorney for Petitioners.

EXHIBIT A.

THE COURT: I am not saying what my decision is going to be, obviously, but I am asking you whether this release can be valid as to Mandell and void as to Food Fair. That is a very simple question.

MR. SCHAFFER: Not on the pleadings in this case, if Your Honor please.

THE COURT: Why not? Not on the pleadings. I am talking about the record that is here before us this morning, the depositions, the letters, the documentary evidence, and so forth.

MR. SCHAFFER: Do you mean absent the pleadings in the case, if Your Honor please?

THE COURT: Of course, you are charging a conspiracy or you wouldn't be here. But the point is they are defending on a release and they say that even though you are correct in your charge that this release was executed but it is void because of something Food Fair did, they then say, "Even though that is true—we don't agree with it—but if it were true, there is nothing in this record to show that we did anything wrong."

MR. SCHAFFER: Well, I submit to Your Honor that the pleadings are part of the record in this case in so far

as the release is concerned because the pleadings raise the question of the release ultimately when I filed my reply, and ——

THE COURT: Of course they raised it.

MR. SCHAFFER: —in that reply, when I answered and filed my reply, I say:

Plaintiffs admit the execution of the document referred to as a release. Plaintiffs aver, however, that the said document is no defense to this action in that . . .

And then I list things including that it was part of a conspiracy, that you can't take the conspiracy out of this case

THE COURT: Then you take depositions and file affidavits, and so forth, and still—I am assuming this now, I am not saying it is a fact—still there is nothing here to show, as they argue, that there is any evidence at all that Mandell was a party to it.

Now, of course you allege it in your complaint or you wouldn't be here.

MR. SCHAFFER: That is right, sir, I allege it in my complaint and in my reply to their answer. Now, what more can I do?

THE COURT: Then you support that by other documents, depositions, affidavits and so forth. But still nothing is disclosed which indicates that Mandell had anything to do with it. That is their position, as I understand it.

MR. SCHAFFER: All right. Now, I would like to answer that position and at least what Your Honor said.

You said that in the depositions I don't connect Mandell up with any conspiracy. Your Honor well knows that I vigorously ——

THE COURT: I say they say that you don't.

MR. SCHAFFER: —disagree with Your Honor's construction of your opinion.

THE COURT: Now, Mr. Schaffer, just calm down a little.

MR. SCHAFFER: Well, it is difficult.

THE COURT: They say that you don't. I am trying to get your position. I know what their position is—I think I do. Now, they say that you don't. Now will you show me where you do?

MR. SCHAFFER: Well, Your Honor must know that these depositions cannot possibly have any information in there concerning the conspiracy that I am talking about, because Your Honor stopped me from asking those questions. Now, to ask me to say to Your Honor—well, all I can point to are the pleadings. I can't do anything else. You couldn't give summary judgment on the pleadings.

APPENDIX.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO. vs. HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court.	Original Action. (Petition for Mandamus.) No. 13109.

PETITION FOR MANDAMUS.

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Petition of John Taxin and Bernard Taxin, trading as John Taxin Co., respectfully represents that:

1. On September 11, 1959, petitioners commenced an action by filing a complaint in the District Court of the United States for the Eastern District of Pennsylvania, captioned as follows:

Civil Action No. 26967.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.

vs.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M.G.S.

MARKETING CO., INC., M.G.S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND and SAMUEL FRIEDLAND.

2. Said complaint averred, inter alia, that defendants had conspired to violate certain sections of the antitrust laws by restraining trade and commerce in fruit and produce distributed in the Philadelphia area and had conspired to monopolize such trade and commerce; that petitioners had suffered loss and damage thereby; and petitioners prayed that defendants be enjoined from further violation of the law and that they be required to pay petitioners money damages.

3. Defendants filed answers to the complaint averring, inter alia, that petitioners were barred from recovery by reason of a release which they had executed and delivered on March 28, 1958.

4. Petitioners filed replies to said Answers averring, inter alia, that the release had been obtained by fraud and was a part and parcel of the conspiracy charged in the complaint.

5. Defendants commenced the taking of depositions of the petitioners and have examined them not only on the release itself, but also generally on the averments in the Complaint.

6. Defendants moved for a separate trial of the release issue under Rule 42(b) which motion was vigorously op-

posed on oral argument by petitioners for many reasons, the most pertinent of which, for present purposes, was that their case would be completely emasculated by a separate trial unless the conspiracy issue could be presented to the jury and if the court should so rule, a separate trial was clearly not necessary.

7. On December 14, 1959, the court filed an opinion and order in which a separate trial to a jury was ordered, a copy of which is attached hereto as Exhibit "A".

8. Petitioners considered whether an interlocutory appeal should be sought but determined to proceed with the separate trial as ordered relying on the following language in said opinion and order:

> "Clearly the evidence necessary to determine the issue of fraud is different from the evidence necessary to determine the issues in the main case. *With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy' plaintiffs will not be limited in their presentation of evidence to support this argument.* However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then we think its validity will have been established. We do not understand how proof of the allegation that the release is 'part and parcel of the conspiracy' could detract from its validity. Nevertheless, as we pointed out above, *plaintiffs will be free to develop this argument at the separate trial.* . . . (Emphasis supplied).
>
> * * * * * * * * *
>
> NOW, THEREFORE, this 14th day of December, 1959, IT IS ORDERED that a jury be empaneled to serve on February 15, 1960. On that date, a separate trial will be held in which the parties may present evidence and arguments on the following questions: . . . (2) whether the release is void because it was obtained as 'part and parcel of the conspiracy'; . . ."

9. On December 16, 1959, petitioners served a notice to take depositions upon defendants' counsel, requesting, inter alia, the production of documents necessarily relating to the conspiracy issue of this case. A copy of this notice was likewise sent to the lower court and is attached hereto as Exhibit "B".

10. At no time after receipt of said notice did the defendants raise any question of petitioners' right to proceed with the taking of depositions pursuant to the court's order and their notice.

11. Petitioners commenced to take the depositions of certain of the individual defendants on December 28, 1959 and, for the first time, counsel for defendants objected to any question relating to the issue of conspiracy and insisted that petitioners' depositions be limited solely to the release issue.

12. An immediate conference was held with the court below which ruled that petitioners' discovery was limited to the release question only and further refused petitioners' request to certify his order of December 14, 1959 nunc pro tunc in order to permit them to apply to this Court for leave to appeal.

13. Petitioners aver that the opinion and order of the court are consistent only with the theory that the conspiracy question would be at issue at the separate trial and, therefore, they are entitled to pre-trial discovery on that point.

14. If the above-quoted language in the opinion and order had been capable of any other construction, petitioners would have sought immediate clarification or at least requested certification so that leave to appeal to this Court could have been applied for.

15. Petitioners aver that the court's construction of its own clear and unambiguous language has placed them in a prejudicial position since, if upheld, they will be forced to the separate trial of the release issue without discovery on an integral part of their case, to wit, whether, in fact, the release was part and parcel of the basic conspiracy charged.

16. Petitioners further aver that there is no speedy or effective remedy by which their rights, privileges and property may be protected save by the issuance of a writ of mandamus.

WHEREFORE, your petitioners respectfully pray your Honorable Court to issue a writ of mandamus directed to Honorable Harold K. Wood, Judge of the District Court of the United States for the Eastern District of Pennsylvania and to the other Judges of said Court requiring and commanding said Honorable Harold K. Wood and said other Judges (a) to so interpret the opinion and order of December 14, 1959 as to permit petitioners to have full and complete pre-trial discovery of defendants and particularly to permit petitioners to interrogate defendants on the issue of conspiracy or (b) in the alternative to certify the order of December 14, 1959 in accordance with the provisions of Title 28 U. S. C. Section 1292 so that petitioners might apply to this Court for leave to appeal the said order and to enter an order staying all proceedings until the determination of this application for a writ of mandamus.

LESTER J. SCHAFFER,
Attorney for Petitioners.

Commonwealth of Pennsylvania }
City and County of Philadelphia } ss.

JOHN TAXIN, being duly sworn according to law, deposes and says that he is one of the petitioners above named; that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOHN TAXIN.

Sworn to and subscribed before me this 5 day of January 1960.

MARY M. DWYER,
Notary Public.
Phila., Phila. Co., Pa.

My Commission Expires March 5, 1961.

EXHIBIT "A".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN TAXIN and BERNARD TAXIN, trading as JOHN TAXIN CO., Plaintiffs,
v.
FOOD FAIR STORES, INC., et al. Defendants.

Civil Action No. 26967 Filed December 14, 1959

MEMORANDUM OPINION AND ORDER

By WOOD, J. December 14, 1959

The issues presently before the Court are (1) whether the defendants' request for a separate trial on certain issues, preliminary to the trial of the main case, should be granted, and (2) if a separate trial is ordered, whether factual questions presented therein should be determined by the Court or by a jury.

This is a private antitrust suit. Plaintiffs complain that defendants have conspired to restrain trade in and monopolize the distribution and sale of fresh fruits and vegetables in the Philadelphia area, and that as a result, the defendants have destroyed plaintiffs' wholesale fruit and vegetable business.

Defendants deny plaintiffs' allegations. In addition, de-

fendants contend (1) that the statute of limitations bars recovery based upon anything occurring before September, 1954, and (2) that a general release executed by plaintiffs on March 28, 1958 bars recovery based upon any liability which defendants theretofore might have had to plaintiffs.

Plaintiffs' reply that the statute of limitations should not be applied in this case in the way defendants contend, and that the release is invalid.

The validity of the release is at present the major issue in this case.

Plaintiffs attack the validity of the release on two grounds. First, plaintiffs allege that the release was obtained by fraud. According to plaintiffs, the defendants orally promised to give plaintiffs $500,000 worth of business per year if plaintiffs would execute the release, but defendants never intended to carry out that promise, and have consistently refused to carry it out. Due to this fraud, plaintiffs argue that the release may be avoided. Second, plaintiffs allege that the release was obtained as "part and parcel of the conspiracy," and that the release is void on this ground alone.

The defendants demand that the question of the validity of the release be tried separately, in advance of the main case, and by the Court without a jury. The plaintiffs do not want a separate trial; but if one is granted, they demand a trial by jury of the factual questions therein. Plaintiffs resist the separate trial, arguing that the evidence necessary to prove the release invalid is the same as the evidence necessary to prove their case in general. This argument is based solely on the second ground of attack on the validity of the release. In other words, plaintiffs say, that in order to prove the release was obtained as "part and parcel of the conspiracy," they would have to prove the conspiracy, which is the very backbone of their main case.

We think that a separate trial of these issues would serve the convenience of all parties to this suit and also the convenience of the Court.

Clearly the evidence necessary to determine the issue of fraud is different from the evidence necessary to determine the issues in the main case. With regard to the evidence necessary to determine the issue of whether the release was obtained as "part and parcel of the conspiracy," plaintiffs will not be limited in their presentation of evidence to support this argument. However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then we think its validity will have been established. We do not understand how proof of the allegation that the release is "part and parcel of the conspiracy" could detract from its validity. Nevertheless, as we pointed out above, plaintiffs will be free to develop this argument at the separate trial.

Rule 42(b) of the Federal Rules of Civil Procedure gives us discretion to order a separate trial of any issue in a case "in furtherance of convenience or to avoid prejudice." If the release, or the statute of limitations, or both, are found to bar or to cut down the scope of plaintiffs' action, the arduous and expensive preparations necessary for trying the main case will have been avoided. On the other hand, if the separate trial does not cut down or bar plaintiffs' case, none of the parties will have been prejudiced by having had these issues determined in advance of the main case.

The attorneys have prepared excellent briefs for our guidance in deciding whether or not factual questions as to whether there was fraud in obtaining this release should be decided by the Court or a jury. After considering the arguments of counsel, we have concluded that these questions should be determined by a jury.

The attorneys have directed their arguments on this point to the question of whether or not the plaintiffs have a constitutional guarantee of a trial by jury on the question of procurement of a release by fraud. Rule 38 of the Federal Rules of Civil Procedure provides: "The right of trial by jury as declared by the 7th Amendment to the Constitution * * * shall be preserved to the parties inviolate." The legal

question to be decided, therefore, is whether the issue of fraud involved here is an issue which was traditionally triable by a jury at the time of the 7th Amendment. The authorities are not in agreement on the answer to this question. The cases are collected in Volume 43 A. L. R. 2d at page 786 et seq. We observe briefly that the trend is toward granting a jury trial on this kind of issue.[1] However, we do not rest our decision to grant a jury trial in this case on the plaintiffs' constitutional rights.

We base our decision to award a jury trial in this case on our discretion as a Court of equity to submit any questions of fact to a jury.[2] There is no principle of law, nor any constitutional guarantee, which requires us to try an issue without a jury.[3] We base the exercise of our discretion in this matter on our belief that the questions of fact to be determined in the separate trial are best answered by a jury. In other words, answering them may involve the resolving of conflicting testimony. The facts to be established or disaffirmed are uncomplicated and few in number.

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[1] The Third Circuit has, to some extent, taken the position that the issue of fraud in the procurement of a contract is an issue for the jury. See **Ettelson v. Metropolitan Life Insurance Company**, 137 F. 2d 62. See also an excellent opinion, in which all the legal intricacies of this problem are fully explored by Chief Judge Leahy of the Delaware District Court. **Canning v. Star Publishing Company**, 138 F. Supp. 843 (D. C. Del. 1956).

[2] "* * * A court of equity has power to frame issues and to submit them to a jury * * *. The court may send any portion of the issues of fact to a jury, submitting such issues as it desires to be advised on * * *. Whether or not a court of equity will exercise its power to submit issues in a particular case is a matter of discretion." 30 Corpus Juris Secundum, Section 495. "While issues of fact may be submitted to a jury in response to a motion for demand by a party to the cause * * * the court may direct a submission of its own motion." Id. Section 498.

[3] See **Hurwitz v. Hurwitz**, 136 F. 2d 796 (C. A. D. C. 1943) at page 798, where the court said: "A defendant has no constitutional right to a trial by the court without a jury. The jury may render a verdict on equitable issues which the court may use as an advisory aid in making findings of fact."

ORDER

NOW, THEREFORE, this 14th day of December, 1959, IT IS ORDERED that a jury be empaneled to serve on February 15, 1960. On that date, a separate trial will be held in which the parties may present evidence and arguments on the following questions: (1) The effect of the statute of limitations on the plaintiffs' action: (2) whether the release is void because it was obtained as "part and parcel of the conspiracy"; (3) whether the release is voidable because it was procured by fraud. With regard to the third question, the jury will determine (a) whether or not the defendants orally promised to give plaintiffs $500,000 worth of business a year in exchange for the release; (b) whether the defendants at the time of making the alleged promise intended to carry it out; and (c) whether the plaintiffs reasonably relied upon the alleged promise in signing the release.

All discovery necessary for preparation of trial on these issues shall be completed before February 8, 1960.

/s/ HAROLD K. WOOD.

EXHIBIT "B".

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.;
VS.
FOOD FAIR STORES, INC., et al.

Civil Action No. 26967

NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION

Harry Shapiro, Esquire
306 S. 19th Street
Philadelphia 3, Pennsylvania
Harold E. Kohn, Esquire
2635 Fidelity-Philadelphia Trust Bldg.
Philadelphia 9, Pennsylvania

Please take notice that at 10:00 o'clock A. M., on December 22, 1959 and thereafter as indicated, at the offices of Lester J. Schaffer, Esquire, 1610 Two Penn Center Plaza, Philadelphia 2, Pennsylvania, plaintiffs in the above entitled action will take the depositions of the following defendants:

Samuel P. Mandell	—	December 22, 1959
Louis Stein	—	December 23, 1959
Myer Marcus	—	December 28, 1959
Arthur Rosenberg	—	December 29, 1959
George Friedland	)	December 30, 1959
Samuel Friedland	)	

upon oral examination pursuant to the Federal Rules of Civil Procedure before a notary public or before some other officer authorized by law to administer oaths.

Please take further notice that the individuals named are hereby required to produce upon such examination the following books, records, papers and documents:

1. Samuel Mandell:

(a) All records, correspondence, memoranda, checks or other documents concerning the payment of $18,000.00 to counsel for John Taxin Company.

(b) All records, correspondence or other documents from January 1, 1949 to date concerning the basis of the arrangement between Samuel P. Mandell and/or his related companies and Food Fair Stores, Inc.

(c) All records, correspondence or documents of any nature concerning claims against transportation companies or suppliers for damage to fruit and produce shipped to Food Fair Stores, Inc. or the other defendant companies, from January 1, 1949 to date.

(d) All books, records or other documents concerning the most recent federal income tax examination of Samuel P. Mandell both individually and of any of his related defendant corporations, with specific reference to disbursements of cash.

(e) All correspondence, memoranda or other documents concerning Samuel P. Mandell's appointment as vice-president of Food Fair Stores, Inc.

(f) All correspondence, memoranda or other documents concerning the formation of World Wide Produce Co.

(g) All records concerning your stock interest in Food Fair Stores, Inc. and the other defendant companies and the dates of your acquisition of such interest.

2. Louis Stein, Myer Marcus, Arthur Rosenberg, George Friedland and Samuel Friedland:

(a) All records, correspondence or other documents from January 1, 1949 to date concerning the basis of the arrangement between Samuel P. Mandell and/or his related companies and Food Fair Stores, Inc.

(b) All correspondence, memoranda or other documents, personal or otherwise, concerning the payment of $18,000 by Samuel P. Mandell to counsel for John Taxin Company.

(c) All correspondence, memoranda or other documents, personal or otherwise, concerning Samuel P. Mandell's appointment as vice-president of Food Fair Stores, Inc.

(d) All correspondence, memoranda or other documents concerning the formation of World Wide Produce Co.

(e) All records, correspondence or other documents concerning the purchases by Food Fair Stores, Inc. from the John Taxin Company from March 28, 1958 to date.

(f) All records concerning your respective stock interest in Food Fair Stores, Inc. and the other defendant companies.

The oral examination will continue according to the schedule set forth or, if not, from day to day.

You are hereby invited to attend and examine the witnesses as you desire.

/s/ Lester J. Schaffer
LESTER J. SCHAFFER,
Attorney for Plaintiffs

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 13,109.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.

vs.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court.

ORDER.

Petitioners' time in which to seek to appeal from the order complained of has gone by. They now, under the prayer of their petition, endeavor to in effect appeal from said order by means of this application.

Mandamus cannot be so used.

The petition is denied.

By the Court,
McLAUGHLIN,
J.

Dated: January 11, 1960.

Received and filed Jan. 12, 1960.

IDA O. CRESKOFF,
Clerk.

CLERK'S CERTIFICATION.

I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original proceedings in this Court in the case of John Taxin and Bernard Taxin, trading as John Taxin Co. vs. Honorable Harold K. Wood, Judge of the United States District Court for the Eastern District of Pennsylvania, and the other Judges of said Court, No. 13,109, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of February in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of
Appeals, Third Circuit.

(Seal)